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Supreme Court of the United States

OCTOBER TERM, 1962

No. 150

HAROLD J. SILVER, d b a MUNICIPAL SECURITIES COM-
PANY, and MUNICIPAL SECURITIES COMPANY, INC.,
Petitioners,

v.

NEW YORK STOCK EXCHANGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF OPPOSING CERTIORARI

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The basis of the petition is that the case involves important questions of federal law which have not been passed upon by this Court. A District Court hearing, as directed by the Court of Appeals, could serve only to facilitate the resolution of such legal issues in the highly complex field of securities trading.

The only issue before the Court of Appeals was petitioners' right to an injunction. In holding they were not entitled to such relief under the Clayton Act, 15 U. S. C. § 26, the Court pointed out that an injunction might nevertheless be available to petitioners and remanded the case for further proceedings. (302 F. 2d at 721.)

Questions of fact should be resolved before review by this Court.

There is a dispute as to several important factual issues relevant to the granting of an injunction—whether it be under the antitrust laws or any other law. Their resolution would, in our view, materially assist this Court in passing upon the legal issues. They include a determination as to whether respondent New York Stock Exchange (“the Exchange”) was arbitrary. A further pertinent question is whether there was any threatened loss to petitioners.

A. The Exchange was not arbitrary.

The first and third questions presented by petitioners assume that the Exchange was arbitrary. In considering this issue, it is first necessary to distinguish between (1) the basis of the Exchange’s decision and (2) the procedure adopted, *i.e.*, the failure to give notice and grant a hearing. The importance of such distinction is apparent from *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U. S. 886 (1961), which held that an employee who had been excluded from a government factory was not entitled to notice and a hearing when the reason advanced for the exclusion was entirely rational. In acknowledging that constitutional restraints prevent such exclusion if the grounds are “patently arbitrary or discriminatory,” this Court stated that that “is not to say that all such employees have a constitutional right to notice and a hearing before they can be removed.” (367 U. S. at 898.)

The Exchange's decision to discontinue the private wires was entirely rational. It was based on the reports of independent investigators which disclosed, among other things, that Silver, in furnishing the information requested by the Exchange, had omitted the names of two corporations with which he had been connected, that the Defense Department had suspended the security clearance of the Silvers and of a corporation of which they had been officers, directors and substantial stockholders, and that their efforts to have the suspension vacated were unsuccessful. These reports also disclosed that the Silvers had apparently breached an agreement relating to the exchange of certain shares of stock. There were further disclosures of a derogatory nature. (302 F. 2d at 716; J. A. 70-71.)

The documents produced on the taking of petitioners' deposition revealed that the Silvers' security clearance had been denied on the grounds that they had "intentionally and without authorization disclosed classified security information," that they had "willfully disregarded security regulations," that their "behavior, activities and associations tend to show that [they] are not reliable and trustworthy," and that they had "deliberately falsified facts and omitted to reveal certain material facts * * * to official representatives of the U. S. Navy and U. S. Air Force." (J. A. 71, 79-84.)

The foregoing alone sufficiently demonstrates that the decision of the Exchange was not "without adequate determining principle or * * * unreasoned," as this Court defined "arbitrary" in *United States v. Carmack*, 329 U. S. 230, 243 (1946).

The Court of Appeals did not pass upon the question whether the Exchange's decision was arbitrary.

It stated only that "the procedure of the Exchange * * * may well be characterized as arbitrary." (302 F. 2d at 721.) It should be emphasized, however, that Municipal Securities Company, Inc. agreed that the private wires "shall be discontinued whenever [the Exchange] shall withdraw approval thereof." (J. A. 57.) To hold that the Exchange was required to give notice and conduct a hearing would be to disregard completely the agreement that the private wires could be discontinued at any time.

The decision of the Exchange was well grounded and the procedure adopted by it was agreed to at the time the private wires were temporarily approved. Any possible doubt on either point should not be resolved on the basis of affidavits but only after a hearing in the District Court. That hearing would develop, among other things, the purpose of the agreement relating to the private wires, the peculiar characteristics of securities trading and, most important, the many problems confronting the Exchange in meeting its obligations under the Securities Exchange Act of 1934, 15 U. S. C. § 78a *et seq.* It would also include an inquiry as to the necessity for the action taken by the Exchange to preserve its standing and reputation and to serve the investing public, the uniform application of its standards to all who apply for private wires, the impossibility of policing the actual use made of private wires by non-members, and the necessity of supervising its members with respect to their transactions in both listed and unlisted securities.

A District Court hearing could not help but be of assistance to this Court in passing upon legal questions of such importance. Mr. Justice Frankfurter's ob-

servations in *Maryland v. Baltimore Radio Show, Inc.*, 338 U. S. 912 (1950), are especially apposite. In commenting upon this Court's refusal to grant certiorari in a case involving issues which "bear upon some of the basic problems of a democratic society * * * that this Court has not yet adjudicated," he stated:

"A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." (338 U. S. at 918, 919.)

Equally pertinent is the view expressed in *Kennedy v. Silas Mason Co.*, 334 U. S. 249, 256-57 (1948), where this Court warned that "summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import * * *. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide."

B. There are questions of fact as to alleged damage.

Injunctive relief to a private plaintiff—under the antitrust laws or any other laws—requires a showing of threatened loss or damage. As this Court stated in *Beacon Theatres, Inc. v. Westover*, 359 U. S. 500, 506-07 (1959): "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." It necessarily follows that without a showing of threatened loss the petition is premature.

Petitioners' affidavits alone raise serious questions as to whether any damage or threat of damage could be attributed to the discontinuance of the private wires in February, 1959. For example, the volume of transactions of Municipal Securities Company, Inc. in unlisted securities began a steady decline in October, 1958—four months before the private wires were discontinued. (J. A. 39.) The only appreciable reversal of that trend took place between April and July, 1959—after the private wires had been discontinued. (*ibid.*) Its transactions as principal in listed securities more than tripled shortly after the private wires were discontinued (J. A. 51-52), and its retail over-the-counter business increased by more than 15% in the six-month period after February, 1959 as compared with the prior six-month period. (J. A. 54.) The number of its transactions in unlisted securities with nine of the ten member firms with which it had private wires declined continuously since October, 1958. (J. A. 191.) Obviously, that decline could not be attributed to the discontinuance of the private wires some four and one-half months later.

Entirely aside from the fact that Municipal Securities Company, Inc. represented on its written application that it desired the private wires as a means of obtaining "continuous quotations of the New York Stock Exchange" (J. A. 55), there is no documentary proof as to the use made of such private wires, that they were anything more than a mere convenience and had no effect on petitioners' business operations, or that petitioners' demise was not due entirely to unrelated causes. For all that appears in the record, petitioners may have been able to operate just as efficiently as the majority of non-member broker dealers

in North America who, incidentally, do not have private wires with member firms. (J. A. 67.)

Moreover, although most of the statements contained in petitioners' affidavits related to matters peculiarly within their knowledge, the Exchange was denied any opportunity to impeach their testimony by cross-examination. Their credibility remained untested by that most valuable feature of the common law system. Demeanor, unrevealed by affidavits, is always an important indication of a 'witness' credibility. Not only would a hearing serve to bring into focus the issues of importance and the conflicting inferences which may be drawn from the facts, but also the credibility of witnesses whose testimony was accepted by the District Court in affidavit form on issues decisive to the case.

In *Poller v. Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962), this Court recently cautioned "that summary procedures should be used sparingly in complex antitrust litigation" and stated:

"It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"

See also *United States v. Diebold, Inc.*, 369 U. S. 654 (1962).

Conclusion

Petitioners' conduct throughout this case has been marked by their efforts to escape cross-examination and to avoid the development of all the relevant facts. They

succeeded, temporarily, on their motion for summary judgment. Their reluctance to participate in a hearing in the District Court represents nothing more than an unwillingness to make available to this Court the relevant facts which should be most helpful in passing upon questions of law of such importance to securities trading. The petition is premature and the writ should be denied.

Respectfully submitted,

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